Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

GERALD C. WOYTHAL,

Petitioner,

vs.

TEX-TENN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. On summary judgment, in an action alleging unlawful age discrimination in employment, what is the plaintiff's burden of proof at the pretext stage after the case of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)?

II. May a plaintiff in an age discrimination case, in response to a defendant's motion for summary judgment which articulates nondiscriminatory rationale, rely upon previously adduced evidence which formulates the basis for his *prima facie* case, and survive summary judgment?

III. May a reasonable inference of intentional discrimination be drawn based upon belief of plaintiff's *prima facie* case and disbelief of defendant's articulated nondiscriminatory rationale?

LIST OF PARTIES

The petitioner is Gerald C. Woythal, an individual. The respondent, Tex-Tenn Corporation, is a Tennessee corporation.

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PETITION FOR WRIT OF CERTIORARI

Gerald C. Woythal respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unofficially reported at *Woythal v. Tex-Tenn Corp.*, 1997 U.S. App. LEXIS 8566; Elec. Cit.: 1997 FED App. 0143P, 70 CCH EPD ¶ 44,658 (6th Cir. 1997). The District Court's opinion is reported at 910 F.Supp. 368 (E.D. Tenn 1995).

The original opinion of the Court of Appeals for the Sixth Circuit is reproduced in the Appendix at App. A. The Order denying the petition to rehear is reproduced in the Appendix at App. C.

The opinion of the United States District Court for the Eastern District of Tennessee is reproduced in the Appendix at App. B.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the Sixth Circuit was entered April 25, 1997. A timely petition for rehearing and rehearing *en banc* was denied on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967 provides in relevant part as follows:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

STATEMENT OF THE CASE

This case involves questions respecting the plaintiff's burden of proof at the pretext stage in an age discrimination case in light of the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The issues raised in this Petition have also been raised in two (2) other cases wherein Petitions for Writ of Certiorari have been filed and not acted upon to date by this Court, to wit: *Raymond Vincent Nidds v. Schindler Elevator Corp.*, Docket No. 97-364 and *E.I. DuPont de Nemours & Co. v. Sheridan*, Docket No. 96-1231. All three (3) cases in essence seek a review by this Court of the same issue: What proof must a plaintiff advance in the face of a motion for summary judgment or motion for directed verdict [i.e., pretext only or pretext

plus] necessary to defeat a defendant's Motion for Summary Judgment (F.R. Civ. P. 56) or Directed Verdict/Judgment as a Matter of Law. (F.R. Civ. P. 50)

Gerald C. Woythal, a 68 year old founding investor of defendant Tex-Tenn, worked for the firm until December of 1993. From 1988 until December 1993, he was Tex-Tenn's chief and only engineer. Woythal possessed forty (40) years of engineering experience and reported directly to the textile manufacturer's founder and president, John Seifert, until early 1993. James Carico was named Tex-Tenn's Operations Manager and became Woythal's immediate supervisor in 1993. Until Carico joined Tex-Tenn, Seifert had no complaints regarding Woythal and the employment relationship appeared rewarding to both parties.

According to Carico, in October of 1993 he expressed concerns over Woythal's alleged lack of determination to solve problems, lack of interest in new projects, rejection of employee ideas and negative attitude. Woythal, by affidavit and deposition, denied Carico discussed these issues with him.

During1993 Seifert, on numerous occasions, asked Woythal what he wished to do for Tex-Tenn and what his plans for retirement were. Woythal consistently responded he wanted to continue working full-time for Tex-Tenn at least until age 70. According to Woythal, each conversation dealing with his retirement was initiated by Seifert. Carico and Seifert admit their continued questioning of Woythal regarding retirement in 1993, and justify the same claiming they never received an adequate response from Woythal. Woythal's co-

workers confirmed Seifert questioned Woythal on numerous occasions about his plans for retirement.

On December 20, 1993, Carico called a meeting with Woythal. The meeting was authorized by Seifert. According to Woythal, during this meeting he was terminated by Carico effective December 30, 1993. Carico and Seifert maintain that Woythal either quit or gave notice of his retirement during the meeting, effective December 30, 1993. Carico and Seifert both state they granted severance pay to Woythal. Woythal claims he requested a ninety (90) day severance package at time of termination.

During the period of November and December, 1993, Carico and Seifert interviewed individuals for an engineering position with the firm, purportedly to serve as Woythal's assistant. Woythal stated he was not asked to participate in the interviews for his "assistant"; all interviews occurred on weekends when Woythal was not scheduled to work.

Woythal's termination became effective December 30, 1993. On January 1, 1994, Bill Soltes, then a thirty-nine (39) year old engineer, replaced Woythal. He was given Woythal's job title, salary and benefits.

Seifert acknowledged he did not have reason to terminate Woythal. Seifert stated Carico did not have authority to discharge Woythal. Carico stated he was not aware Woythal understood he had been discharged until months later when Woythal filed his EEOC charge; however Seifert admitted Carico may have told him he fired Woythal, and that prior to Woythal's departure on

December 30, 1993, Seifert knew Woythal was of the opinion he had been fired. Seifert did nothing to dispel Woythal's belief he had been fired. Seifert did not offer Woythal his job or advise Woythal he could work in an alternative position with Tex-Tenn.

The District Court concluded that in order for Woythal prove a *prima facie* case of age discrimination he must demonstrate each of the following:

1. He belongs to a protected class.

2. He was qualified to do the job.

3. Despite his qualifications, he suffered an adverse employment decision.

4. His position was filled by someone outside that protected class.

Tex-Tenn did not dispute the existence of the first, second and fourth prongs of a *prima facie* case. The District Court concluded a genuine issue of material fact existed as to the third prong of Woythal's *prima facie* case.

The District Court was in error when it concluded that even assuming "the existence of a *prima facie* case, Woythal would still bear the ultimate burden of showing Tex-Tenn intentionally discriminated against him because of his age." Although technically correct, the District Court should have additionally noted that Woythal had the burden of demonstrating pretext from which intentional discrimination may be inferred. The District

and Circuit Courts assumed the role of trier of fact by imposing upon him a pretext plus burden over and above his *prima facie* case once he had offered evidence to call into question the defendant's proffered reasons for Woythal's departure. Rational inferences supporting pretext might be drawn from the following facts viewed in the light most favorable to Woythal:

- Tex-Tenn maintains it had no reason to fire Woythal and did not fire him. Woythal maintains he was fired.

- Woythal's replacement, purportedly hired to be his assistant, was never interviewed by or introduced to Woythal. Woythal was not asked to review his assistant's resume. All interviews with Woythal's "assistant" were conducted on weekends, outside the presence of Woythal, when Woythal was not working, by Tex-Tenn's President Seifert and Operations Manager Carico, neither of whom possess engineering experience.

- Upon learning Woythal "mistakenly" believed he was fired, Tex-Tenn President Seifert took no steps to otherwise enlighten Woythal such was not the case.

- Although Operations Manager Carico denies firing Woythal, Carico claims he granted Woythal 90 days severance pay, an unlikely occurrence if Woythal quit as urged by Tex-Tenn. On this same point,

Tex-Tenn President Seifert claims that he granted Woythal 90 days severance pay, even though Woythal quit.

- President Seifert states he had no reason to terminate Woythal, and that Carico, as Woythal's supervisor, was not authorized to terminate Woythal. Yet Seifert admits that Carico may have indicated to him that he (Carico) told Woythal to vacate his office by December 30, 1993.

- After the December 20, 1993 meeting in which Woythal maintains he was fired, Tex-Tenn Operations Manager Carico, Woythal's immediate supervisor, states Woythal was to let him know what his plans were for continuing to work for Tex-Tenn prior to December 30, 1993. Yet on the following day, December 21, 1993, without response from Woythal, Carico hires Woythal's 39 year old "assistant" at the same pay/benefits enjoyed by Woythal.

REASONS FOR GRANTING THE WRIT

In age discrimination cases, shifting burdens of production and their interaction with the ultimate burden of proof control decisions on summary judgment. Despite the Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Supreme Court has not clearly established the modicum of proof a plaintiff must offer to fulfill that "ultimate burden."

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the U.S. Supreme Court adopted a burden shifting approach to proof in Title VII discrimination cases. Under this tiered approach, a plaintiff may prevail on an employment discrimination claim in the absence of direct evidence of discrimination. The first tier requires the plaintiff to establish a prima facie case of discrimination. The plaintiff must produce evidence that: (1) she is a member of a protected class; (2) that she was qualified to perform the job; (3) that despite her qualifications adverse action was taken by the employer; and (4) that the position was filled by someone with similar qualifications. "The burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

After the plaintiff crosses this hurdle, the defendant must present a legitimate non-discriminatory reason for the adverse job action. *Id.* at 254. After the employer fulfills this burden of production, the plaintiff must demonstrate that the proffered reason is a "pretext," and "this burden . . . merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256.

As stated previously, despite the Court's opinion in *St. Mary's Honor Center v. Hicks*, *supra*, the Supreme Court has not clearly established the modicum of proof a plaintiff must offer to fulfill that "ultimate burden."

One reading of *Hicks* suggests that a plaintiff's demonstration of pretext alone is insufficient to support judgment. *Hicks* therefore may be read to require the

plaintiff to demonstrate that the articulated reason was pretextual *plus* offer evidence from which the factfinder could conclude that the employer discriminated. *Id.* at 2754 ("It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination"). This requirement/reading of *Hicks* is referred to by commentators and in the courts of appeal as "pretext plus." "[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false *and* that discrimination was the real reason." *Id.* at 2752. The Sixth Circuit in the instant case (Woythal) adopted this perspective, contrary to its prior holding in *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078 (6th Cir. 1994).

On the other hand, another "reading/interpretation" of *Hicks* suggests the majority opinion does not squarely hold that this requirement imposes an evidentiary burden in addition to pretext. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 2749. Thus, under another interpretation of *Hicks*, evidence of pretext may itself fulfill the plaintiff's ultimate burden of proving discrimination.

In the wake of *Hicks*, the circuit courts have taken different approaches to this problem. One approach, adopted by the First and Fifth Circuits, requires, to avoid summary judgment, that a "plaintiff must introduce sufficient evidence to support two findings: (1) that the employer's articulated reason for laying off the plaintiff is

a pretext, and (2) that the true reason is discriminatory." *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995). Accordingly, the Fifth Circuit has affirmed summary judgment against a plaintiff with credible evidence of pretext but no evidence of discrimination. *See Bodenheimer v. PPG Indus.*, 5 F. 3d 955, 958 (5th Cir. 1993). In these circuits, defendants will prevail whenever the plaintiff cannot additionally muster evidence of discrimination, i.e., pretext plus.

Other circuits hold that evidence of pretext alone bars summary judgment. The Third Circuit requires the plaintiff to "point to some evidence . . . from which a factfinder could reasonably **either** (1) disbelieve the employer's articulated legitimate reasons; ***or*** (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994) (citations omitted) (emphasis added). *Sheridan v. E.I. DuPont de Nemours & Co., 74 F.3d 1439 (3rd Cir. 1996)* The use of the disjunctive announces that evidence of pretext alone will allow a plaintiff to get to the jury. The same approach governs in the Seventh Circuit, *see Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir. 1995) (to defeat summary judgment employee must introduce evidence that "company's proffered reasons were pretextual"), and in the Second Circuit, *see Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995). This standard resolves the tension between the two conflicting statements in *Hicks* by resolving doubts against summary judgment - leaving it to the factfinder to determine whether the evidence of pretext established the required element of discrimination.

The remainder of the circuits acknowledge the tension in *Hicks* without resolving it. Cases taking this approach recognize that the plaintiff retains the burden of proving discrimination, and that a triable case requires that the plaintiff's evidence establish that the employer's proffered reason is a pretext for discrimination. The cases thus view *Hicks* as creating a permissive inference of discrimination where the employer's proffered reason is pretextual. *See, e.g., Krenik v. County of LeSueur*, 47 F.3d 953 (8th Cir. 1995); *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1557 (11th Cir. 1995); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995); *Manzer v. Diamond Shamrock Chem. Co.*,*Supra* at 1084. Thus, the cases admit the possibility acknowledged by *Hicks* without adopting an approach that *requires* denial of summary judgment in every case that a plaintiff presents evidence of pretext. Although this creates uncertainty as to the proper disposition on summary judgment, it is arguably most faithful to *Hicks*.

This Court, in *Hicks,* did not explain when evidence of pretext will amount to evidence of discrimination. Accordingly, struggles have developed within and among the circuits on the issue. For example, the Sixth Circuit has rejected the pretext and pretext plus approaches, adopting its own test on the issue. *[See Manzer, supra]*

Had Woythal's case been brought in the Eleventh or Third Circuit, more likely than not the District Court would have been reversed resulting in Woythal's case being decided by the jury. The Eleventh Circuit, on July 14, 1997, in a case consisting of facts strikingly similar to those of *Woythal*, held that the question of whether a

plaintiff was terminated from his job required an alaysis of the employer's intent, which may be inferred not only from the employer's word, but also the employer's actions. The Eleventh Circuit concluded "we find that [the plaintiff] presented sufficient evidence to raise a jury question as to whether she was actually terminated." *Thomas v. Dillard Department Stores, Inc.*, 96-2966 (11th Cir. July 14, 1997)

CONCLUSION

After *Hicks*, confusion abounds within and among the Circuits on the question of the quantum and nature of evidence which a plaintiff must produce to preclude summary judgment or a directed verdict. Certiorari should be granted to resolve this important federal question.

Respectfully submitted:

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 25, 1997

No. 96-5020

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GERALD C. WOYTHAL,
Plaintiff-Appellant,

v.

TEX-TENN CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed April 25, 1997

Before: KENNEDY, BOGGS, and WOOD, JR.,* Circuit Judges.

WOOD, JR., Circuit Judge. Plaintiff-Appellant Gerald Woythal appeals the district court's grant of summary judgment in favor of the Defendant-Appellee, Tex-Tenn Corporation. Woythal, a sixty-eight year old male, filed a

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*The Honorable Harlington Wood, Jr., Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

complaint under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, alleging that Tex-Tenn fired him because of his age. Tex-Tenn filed a motion for summary judgment, and because the court found that Woythal could not prove that Tex-Tenn intentionally discriminated against him because of his age, it granted summary judgment in Tex-Tenn's favor. Woythal appeals, and we affirm.

Gerald Woythal was one of Tex-Tenn's founding investors in 1981, and worked there as an engineer from 1981 until December 1993. From December 1988 until December 1993, he was Tex-Tenn's Chief Engineer. For most of that time, Woythal answered only to Tex-Tenn's president, John Seifert. In early 1993, however, Seifert created the job of Operations Manager and hired James Carico to fill the position. One of the Operations Manager's duties was supervising the engineering department, including Woythal. Carico and Woythal never quite hit it off, and Woythal claims to have had difficulty communicating with Carico, finding him unavailable when he was needed. Carico characterizes Woythal as displaying a negative attitude and as being apathetic about the company's future.

Tex-Tenn was experiencing rapid growth at this time, and Seifert was concerned about the engineering department's ability to meet increased demands. He decided to hire an additional engineer as an assistant for Woythal, a decision that Woythal supported. However, Seifert found Woythal to be uninterested in helping to recruit a new engineer. Thus, without asking Woythal to review resumes or interview any of the applicants, Seifert and Carico hired Bill Soltes, then age 39, to fill the position.

At about this same time, rumors circulated among Tex-Tenn employees that Woythal was considering retirement. Several employees later testified that Woythal told them that he was planning to retire soon. Concerned about retaining sufficient engineering support for Tex-Tenn's

future, Seifert inquired of Woythal several times what he wanted to do for Tex-Tenn and what his plans for retirement were. Each time, Woythal indicated that he wanted to continue working full-time until at least age 70. Seifert, however, found Woythal's answers evasive, and to him, Woythal seemed unwilling to participate in the process of planning for Tex-Tenn's growth and expansion. He asked Carico to try his hand at motivating Woythal to become more involved.

Carico met with Woythal in October 1993, but that is the extent to which the parties agree on the events of that meeting. Woythal asserts that the two simply spoke about various engineering matters. Carico, on the other hand, testified that he discussed Woythal's lack of determination to solve problems, his lack of interest in new projects, and his negative attitude. Woythal denies this. In any event, Seifert was still unsatisfied with Woythal's responses to questions about his plans for the future, and he made more inquiries about Woythal's rumored retirement. He insisted that Carico get a definite commitment from Woythal on what his plans were.

Carico and Woythal met again on December 20, 1993, and again the parties disagree on what was said at the meeting. Woythal maintains that Carico terminated his employment; Carico testified that he did not terminate Woythal, but instead told him that Tex-Tenn needed his participation, and that if Woythal chose not to participate, he would not be needed. Carico informed Woythal that he wanted to know by the end of December whether Woythal intended to be an active participant in the company. Regardless of what was actually said, Woythal interpreted Carico's message to mean that he was fired, and he cleared out his office and was gone by December 30. Seifert and Carico insist that they did not fire Woythal, but that he chose to either resign or retire. In the days before Woythal left Tex-Tenn, Seifert learned that Woythal believed he had been fired. Seifert told Woythal he was sorry Woythal had decided to leave. He expressed a desire to work things

out, and said Woythal could keep his keys and could come back any time he changed his mind.

Bill Soltes started work on January 1, 1994, and because Woythal was no longer working at Tex-Tenn, was given the position of Chief Engineer, Woythal's former position. Soon after, Woythal filed suit under the ADEA, charging that Tex-Tenn had fired him because of his age and had replaced him with a younger employee. The district court granted summary judgment in Tex-Tenn's favor, holding that although it assumed for purposes of summary judgment that Woythal had stated a prima facie case of age discrimination, he did not have enough evidence to convince a reasonable jury that Tex-Tenn had intentionally discriminated against him because of his age.

We review a district court's grant of summary judgment *de novo*, examining the record and drawing all inferences in the light most favorable to the non-moving party. *City of Mount Clemens v. United States Envtl. Protection Agency*, 917 F.2d 908, 914 (6th Cir. 1990). Our task is to determine whether summary judgment was appropriate in this case; thus, we will examine the record as a whole to determine whether a genuine issue of material fact exists or whether Tex-Tenn is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In order to prevail, Woythal must provide sufficient facts that, if believed, would allow a reasonable jury to conclude that Tex-Ten fired him. He also must produce "direct, indirect, or circumstantial evidence that [his] age was a factor in the decision to terminate [him] and that 'but for' this factor [he] would not have been terminated." *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314-15 (6th Cir. 1989), *citing Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-66 (6th Cir. 1986).

Under the *McDonnell Douglas* burden-shifting method for proving employment discrimination claims when no direct evidence of discrimination exists, Woythal's first

step is to state a prima facie case of age discrimination. To do this, he must prove that:

1. He is a member of a protected class;
2. He is qualified to do his job;
3. Despite his qualifications, his employment situation was adversely affected; and
4. His position was filled by a younger individual.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1309-10 (1996) (assuming that *McDonnell Douglas* framework is applicable in ADEA cases). If Woythal can prove these four elements, the burden of production shifts to Tex-Tenn to rebut the prima facie case by stating a legitimate non-discriminatory reason for its actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Once this is done, Woythal, who retains the burden of proof at all times, must produce sufficient evidence to allow a jury to reasonably reject Tex-Tenn's explanation. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-11; *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994).

In its motion for summary judgment, Tex-Tenn claimed that Woythal had not stated sufficient facts to even establish a prima facie case. While it admitted that Woythal was a member of a protected class, qualified to do his job, and was replaced by a younger person, Tex-Tenn contested Woythal's claim that his employment situation had been adversely affected because it denies that Woythal was fired. Thus, a genuine issue of fact exists as to the existence of a prima facie case, and the district court, properly viewing the facts in the light most favorable to Woythal, let the case proceed on the assumption that he had been fired. *See Lenz v. Erdmann Corp.*, 773 F.2d 62, 64 (6th Cir. 1983); *EEOC v. Our Lady of Resurrection Medical Center*, 77 F.3d 145, 149 (7th Cir. 1996).

This did not defeat Tex-Tenn's summary judgment motion, however, for it still had the opportunity to

articulate a legitimate, non-discriminatory reason for firing Woythal. *Burdine,* 450 U.S. at 254. It did this by explaining that Woythal resigned in the absence of intentional age-based discrimination: Tex-Tenn maintains that after being told to "shape up or ship out," Woythal chose the latter option and resigned. In addition, it contends, if it actually did fire Woythal, his age was not the motivating factor. Tex-Tenn cites Woythal's negative attitude and lack of interest in the company's future as non-discriminatory reasons for firing him, had it done so. As these were legitimate non-discriminatory reasons for Woythal's departure, Tex-Tenn met its burden of production. Woythal next had the opportunity to show that Tex-Tenn's reasons were a pretext for discrimination. To do this, he is required to produce sufficient evidence from which a jury could reasonably reject Tex-Tenn's explanation, because "[i]t is not enough . . . to *dis*believe the employer['s proffered nondiscriminatory reasons]; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Hicks*, 509 U.S. at 519. In other words, in order to defeat the motion for summary judgment, Woythal must show that Tex-Tenn intentionally discriminated against him because of his age. *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1993); *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-66 (6th Cir. 1986).

To do this, Woythal relies on the questions that Seifert and others asked him about his plans for retirement. He insists that each time Seifert asked him what he wanted to do for the company and what his plans for the future were, he answered that he wanted to keep working for Tex-Tenn until he was about 70 years old. Woythal claims that Seifert, Carico and others continued to ask him about his retirement "to the point that he believed he was being pressured to retire. . . ." However, as the district court noted, these questions about his plans for the future do not amount to evidence that Woythal's age was the reason for his departure from Tex-Tenn; in fact, he has not shown that anyone at Tex-Tenn made direct references to his age at all. The cases Woythal relies on to show that comments

about an employee's age or impending retirement can indicate discriminatory motive all involve far more egregious statements than occurred here. *See McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990) (older employee told he could be "cheaply replaced with a younger salesman"); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1094 (5th Cir. 1994) ("old man," "old and inflexible" and "incapable"); *Corbin v. Southland Int'l Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994) ("at your age you cannot produce like you once could, and we are going to have to make some kind of adjustment"); *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1108 (9th Cir. 1991) ("old warhorse"); and *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596, 601 (D.Me. 1994) (employer provided plaintiff with unsolicited and unwelcome retirement information package and suggested that he retire). Compared to these statements, Seifert's "what are your plans for the future" is more of a friendly inquiry than a covert attempt to force retirement. It is evident that Seifert never felt he got a straight answer from Woythal, and was frustrated, as his directives to Carico reveal. It does not appear, however, that Seifert was trying to make Woythal retire.

To show that the questions about his plans were related to his age, Woythal relies on *Braverman* and other cases which hold that a supervisor's pressure and constant questioning of an older employee about retirement is sufficient to raise an inference of discriminatory intent to defeat a motion for summary judgment. *See Sischo-Nownejad*, 934 F.2d at 1108; *Rottersman v. CBS Inc.*, 726 F. Supp. 484, 488, 492 (S.D.N.Y. 1989). Both *Braverman* and *Rottersman* indicate that pressure to retire occurs when the employer initiates the questioning and then pointedly suggests retirement. In this case, however, no one at Tex-Tenn ever explicitly mentioned retirement or suggested to Woythal that he retire. Seifert merely asked Woythal what his plans were, and did not suggest that Woythal should have answered his questions by announcing his plans to retire. In addition, as the district court noted, the testimony of Tex-Tenn employees showed that Woythal

himself generated many of the rumors regarding his retirement. As Tex-Tenn's president, Seifert had a legitimate concern in making sure that Tex-Tenn had continuing engineering support, and he was entitled to inquire of Woythal whether the rumors were true. Asking questions about an employee's plans for the future, without referring to the employee's age, especially when rumors are circulating that the employee is planning to retire, does not amount to pressure to retire. This is so even though Woythal may have interpreted it as pressure, because "[m]ere personal belief, conjecture and speculation are insufficient to support an inference of age discrimination." *Chappell*, 803 F.2d at 268; *see also Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 567 (5th Cir. 1983). We agree with the district court, and hold that a reasonable jury could not consider the fact that Seifert asked Woythal about his future plans to be evidence of intentional age discrimination.

Woythal argues, however, that these questions coupled with the hiring of Bill Soltes the day after Woythal left Tex-Tenn provide evidence that it was Tex-Tenn's clever plan to pressure him to retire, and when that didn't work, to then fire him and replace him with someone younger. Woythal initially agreed to the hiring of an assistant, however, and Seifert and Carico had made preparations to hire Soltes long before Woythal left Tex-Tenn. It is evident from the accounts of the interviews that Seifert and Carico did not intend to hire Soltes as a replacement for Woythal as the Chief Engineer; rather, he was to be an assistant. He only achieved the position as Chief Engineer as quickly as he did because Woythal's employment ended. This incident is more coincidental and innocent than orchestrated and sinister, as Woythal insists. We do not think a reasonable jury would be convinced that Seifert and Carico planned this turn of events in advance.

Thus, Woythal cannot succeed in showing that Tex-Tenn's reasons for his departure from that company are pretext for age discrimination. Even assuming that he was fired, we find no concrete evidence of intentional age-based

discrimination. The district court's grant of summary judgment in Tex-Tenn's favor is AFFIRMED.

APPENDIX B — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE FILED DECEMBER 7, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENEVILLE

No. 2:95-CV-87

Judge Curtis L. Collier

GERALD C. WOYTHAL,

Plaintiff,

v.

TEX-TENN CORPORATION,

Defendant.

ORDER

In accordance with the accompanying Memorandum, the Court hereby **GRANTS** the Motion for Summary Judgment filed by Defendant Tex-Tenn Corporation (Court File No. 9). There being no other issues before the Court, this case is **DISMISSED.**

SO ORDERED.

ENTER:

s/ Curtis L. Collier
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENEVILLE

No. 2:95-CV-87

Judge Curtis L. Collier

GERALD C. WOYTHAL,

Plaintiff,

v.

TEX-TENN CORPORATION,

Defendant.

MEMORANDUM

Before the Court is the Motion for Summary Judgment filed by Defendant Tex-Tenn Corporation ("Tex-Tenn") (Court File No. 9). Plaintiff Gerald C. Woythal ("Woythal") fled a Response (Court File No. 13). Woythal brought this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

Woythal claims Tex-Tenn fired him "because of Woythal's age, 67, and not due to an inability on Woythal's part to satisfactorily accomplish his job responsibilities. There exists no rational business justification for the termination of Woythal" (Court File No. 1, ¶ 17). Tex-Tenn first contends Woythal cannot prove a *prima facie* case of age discrimination because he cannot show Tex-Tenn discharged him and then argues Woythal did not

suffer an adverse employment decision because of his age (Court File No. 10, p. 1). For the following reasons, the Court will **GRANT** the motion for summary judgment.

I. RELEVANT FACTS

Tex-Tenn, formed in 1981, manufactures deep pile sliver, circular knit fabric from polyester, acrylic, mod-acrylic, wool fibers, and other synthetic yarns. John Seifert ("Seifert") is founder and President of Tex-Tenn. Woythal was an original investor in the company and an employee until December 1993. Woythal, an engineer, at first had secondary responsibility for engineering duties at the company, but then held the position of Plant Manager from 1983 until 1988. From 1988 until the end of December 1993, Woythal served as Tex-Tenn's Chief Engineer and oversaw all engineering responsibilities. At the time Woythal left Tex-Tenn's employment, he was sixty-seven (67) years old.

Toward the close of 1992 and early in 1993, Tex-Tenn began a period of growth and expansion (*See* Court File No. 9, Aff. of C. John Seifert, ¶ 4; *see also id.*, Depo. of Gerald C. Woythal, p. 103). Seifert questioned whether the engineering department could address the increased demand (*See id.*, Seifert Aff. at ¶ 4) and discussed with and got agreement from Woythal that an additional engineer would help (*See id.* at ¶ 5; *see also* Woythal Depo. pp. 62, 84, 103).[1]

---

1. Woythal contends the circumstances of Tex-Tenn's hiring of William Soltes ("Soltes"), thirty-nine (39) years old at the time, unequivocally demonstrates Tex-Tenn's discrimination against him (*See* Court File No. 13, p. 6). Tex-Tenn does not contest this aspect of a *prima facie* case of age discrimination (*See* Court File No. 10, p. 10). The Court finds this factor goes more toward establishing a *prima facie* case, rather than conclusively evidencing discrimination. Assuming, *arguendo*, a *prima facie* case is

(Cont'd)

Appendix B

During most of Woythal's employment, Seifert directly supervised him. In April 1993, James Carico ("Carico"), Tex-Tenn's newly hired Operations Manager, assumed responsibility for overseeing the engineering department, comprised of Woythal and five other employees. Carico had experience in management and training but very little background in textiles. In order to learn the business, Carico states he relied on Tex-Tenn's experienced employees (Court File No. 9, Aff. of James Carico, ¶ 2). Woythal's Response notes he very soon found Carico unavailable and communication with him difficult (Court File No. 13, pp. 2-3). Carico characterizes Woythal as "disinterested in his own duties, and in the various projects requiring his attention throughout the company" and his "input and participation" as "not forthcoming" (Court File No. 9, Carico Aff. ¶ 3). Seifert observed Woythal "did not seem interested in long or short range planning, and generally appeared to have lost interest in the company" (*Id.*, Seifert Aff., ¶ 6).

Coupled with Tex-Tenn's period of growth and Seifert's and Carico's observations of Woythal's apparent attitude toward work, rumors circulating of Woythal's retirement gave Seifert cause for concern (*Id.*, Seifert Aff. ¶ 3). It is clear such rumors abounded (*See* Court File No. 9, Depos. of: C. John Seifert, p. 126; James H. Carico, p. 82; Wayne A. Swihart, p. 52; R. Scott Hammitt, p. 16; Ed Coffey, p. 16; Darryl Jay Webb, p. 16; Alan Hale, p. 9; and William James McDavid, p. 13). It is

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(Cont'd)

established and then rebutted by the defendant, any presumption of discrimination "drops from the case." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. __, __, 113 S.Ct. 2742, 2747 (1993) (citation omitted); *see also Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1085 (6th Cir. 1994) ("We do not find any evidence, other than that which established his four prima facie elements, that age played any part in Manzer's termination.").

also clear that at least some of them originated from Woythal himself (*See generally id.*). Rumors, though, have various shapes and sizes and, when jumbled together, lack definition (*See generally id.*).

Seifert several times asked Woythal to tell him of his employment plans and the role he wanted to have at Tex-Tenn (Court File No. 9, Seifert Aff. ¶ 3; *see also id.*, Carico Aff. ¶ 4 and Swihart Depo. p. 52). Woythal argues he consistently told Seifert he wanted to continue working full-time at Tex-Tenn (Court File No. 13, p. 4). Seifert contends he never got a clear response from Woythal and he then sought Carico's help to talk with him (Court File No. 9, Seifert Aff. ¶¶ 3, 6). In October 1993, Carico met with Woythal. Carico remembered the meeting dealt with Woythal's general performance and described it as "motivational" (Court File No. 13, Carico Depo. pp. 20-21). Woythal recalled the meeting pertained to specific aspects of plant operations (Court File No. 13, p. 3). Woythal also points out neither he nor Carico considered the meeting as a prelude to his ultimate departure from Tex-Tenn (Court File No. 13, p. 3; Court File No. 13, Carico Depo. p. 21 and Woythal Depo. p. 90). Carico later told Seifert about the meeting and submitted a summary of it to Woythal's personnel file (Court File No. 10, p. 4).

Tex-Tenn claims Woythal after this meeting continued to be evasive as to his plans and lackadaisical as to his work (*Id.*). On 20 December 1993, with Seifert's knowledge, Carico again met with Woythal. Woythal argues Carico, on behalf of Seifert, clearly fired him and told him "he should vacate his office by 30 December 1993" (*See* Court File No. 13, pp. 4-5). Woythal cites two statements Seifert made during his deposition testimony as support for his version of the meeting. When

discussing with Carico the purpose of the December 1993 meeting, Seifert states he told Carico (1) to "tell Gerry to get off the pot, what does he want to do?"; and (2) "push this to the wall to the extent that we can get Gerry to commit to what the hell he wants to do" (Court File No. 13, p. 5, *citing* Seifert Depo. pp. 127 and 106, respectively). Seifert made an additional relevant comment pertaining to the 20 December 1993 meeting not cited by either party. The deposition questions and answers follow:

> Q: . . . Even though you had some disagreements and you hadn't gotten along, you're telling me —
>
> A: We always got along.
>
> Q: Well, I mean as human beings sometimes don't get along. I don't mean that you were at each other's throats. But you'd had some disagreements and you'd had some differing views and so forth. Really, there was no reason that you would have for getting rid of him, was there?
>
> A: The only thing — the only thing that would happen is that it was not to get rid of Gerry but Carico was told for heaven's sakes get an answer for me. It was a test of Carico as much as it was for Woythal.
>
> Q: So the answer to my question would be no, that you would have no reason to get rid of him?
>
> A: That's correct.

(*Id.*, Seifert Depo. pp. 143-44). Tex-Tenn argues it did not fire Woythal. The company describes the meeting as leaving the decision to Woythal whether to participate actively in the company or to leave voluntarily (*See* Court File No. 10, pp. 4-5).

Woythal believed the 20 December 1993 meeting to be the culmination of a series of meetings and discussions about his retirement, all designed to pressure him to retire (*See* Court File No. 13, pp. 3-5). Significantly, Woythal states Seifert never complained of his "work product, work efficiency, work ethic, or attitude" and, moreover, Seifert admitted to having no basis for terminating his employment (*Id.* at p. 3). Woythal emphasizes Seifert and Carico admitted they often questioned him about retirement and other employees "perceived" the questions about his intentions to specifically address his retirement (*Id.* at p. 4). As noted above, Woythal claims he consistently told Seifert he wanted to continue working, while Tex-Tenn contends Woythal equivocated at best. To this end, Woythal contends Seifert never tried to clarify any "misunderstanding" Woythal had regarding the 20 December 1993 meeting by either offering his job back or suggesting a different job at Tex-Tenn (Court File No. 13, p. 5).

II. STANDARD OF REVIEW

Under *Fed. R. Civ. P.* 56(c), the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show that no genuine issue of material fact exists, *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Kentucky Div., Horsemen's Benev. & Prot. Assoc., Inc. v. Turfway Park Racing Assoc., Inc.*,

20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow*, 44 F.3d 426, 429 (6th Cir. 1995); *City Management Corp. v. U.S. Chemical Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994). Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary

judgment. *Id.*; *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411.

III. ANALYSIS

Tex-Tenn's motion for summary judgment first argues Woythal cannot demonstrate a *prima facie* case of age discrimination because he cannot show he suffered an adverse employment decision. The Court understands Tex-Tenn to contend Woythal voluntarily resigned. Second, Tex-Tenn argues Woythal cannot show that any sort of alleged adverse employment decision, if so found, was actually motivated by age-based discrimination. The Court understands Tex-Tenn to contend Woythal lost interest in his job, speculated that Tex-Tenn was trying to force him to retire, and chose not to change his attitude toward work. This, too, resulted in Woythal's voluntary resignation. The Court finds both of these contentions implicate the legal effect to be given rumors, references, and questions made to and about an employee regarding that employee's retirement.

First, though, the Court does find a genuine issue of material fact as to the exact nature of the 20 December 1993 meeting between Carico and Woythal. Carico states he did not fire Woythal, but that Woythal chose to voluntarily resign; Woythal states Carico affirmatively told him to vacate his office by 30 December 1993. There is thus a genuine issue of material fact as to the existence of the third prong of a *prima facie* case.[2] In order to prove a *prima facie* case of age discrimination, Woythal must prove the following:

---

2. Tex-Tenn does not dispute the existence of the first, second, and fourth prongs of a *prima facie* case (*See* Court File No. 10, p. 10).

(1) he belongs to a protected class;

(2) he was qualified to do the job;

(3) despite his qualifications, he suffered an adverse employment decision; and

(4) his position was filled by someone outside that protected class.

Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1329 (6th Cir. 1994); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990).

Upon proof of a *prima facie* case, a presumption of discrimination arises, to which the defendant may respond by providing a legitimate, nondiscriminatory reason to rebut the *prima facie* case. *St. Mary's*, 113 S.Ct. at 2747, *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If the defendant meets this burden, the plaintiff then has an opportunity to show the proffered reasons are a pretext for discrimination. *St. Mary's*, 113 S.Ct. at 2747. It is crucial, however, that under the *McDonnell Douglas* burden shifting framework, the "*ultimate burden of persuading the trier of fact* that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff." *Id.* (emphasis added). Such is the plaintiff's burden even when the trier of fact rejects the defendant's proffered nondiscriminatory reasons. *Id.* at 2749 (noting rejection of the defendant's reasons does not "*compel*[] judgment for the plaintiff[,]" which would be counter to the "repeated admonition that the . . . plaintiff at all times bears the 'ultimate burden of persuasion' ") (citations omitted). "Even

though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Id.* at 2749 n. 4.

Second, following *St. Mary's*, even if the Court assumed the existence of a *prima facie* case, Woythal would then still bear the ultimate burden of showing Tex-Tenn intentionally discriminated against him because of his age. *Id.* at 2754 ("It is not enough, . . . , to disbelieve the employer['s proffered nondiscriminatory reasons]; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") Thus, even though Tex-Tenn contends Woythal voluntarily resigned, which gives rise to a genuine issue of fact as to the existence of a *prima facie* case, Tex-Tenn is not somehow precluded from *articulating* a legitimate, nondiscriminatory reason for Woythal's departure from the company simply because Tex-Tenn claims no adverse employment decision occurred.

> The reasons the defendant sets forth are set forth 'through the introduction of admissible evidence.' In other words, the defendant's 'articulated reasons' *themselves* are to be found 'lurking in the record.'

Id. at 2755 (citations omitted); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("The jury may not reject an employer's explanation . . . unless there is a sufficient basis *in the evidence* for doing so. To allow [this] . . . would subtly, but inarguably, shift the burden of persuasion from the plaintiff to the defendant, which we must not permit.") (citations omitted). Woythal must show Tex-Tenn intentionally discriminated against him because of his age. Tex-Tenn's proffered response is, in fact, straightforward: Woythal

voluntarily resigned from the company in the absence of intentional age-based discrimination. That Woythal must address this reason, which happens to coincide with his ultimate burden, does not alter the principle clarified in *St. Mary's*.

As noted above, Tex-Tenn's contention that Woythal cannot demonstrate intentional age discrimination implicates the legal effect to be given rumors, references, and questions made to and about an employee regarding that employee's retirement. Woythal's Complaint addresses this issue: "Prior to December 20, 1993, agents of Tex-Tenn requested Woythal to resign and/or curtail his activities with Defendant Tex-Tenn. Woythal refused all such requests, indicating his desire to continue work with Defendant corporation until age 70" (Court File No. 1, ¶ 15). As noted above, the rumors of Woythal's retirement abounded. Woythal bases his belief of age discrimination upon the existence of these rumors and Seifert's and Carico's responses to them, i.e., the questioning of Woythal as to his employment plans (*See* Court File No. 13, pp. 10-12). Specifically, Woythal contends "comments regarding retirement made by a decisionmaker provide direct and circumstantial evidence of discrimination" (*Id.* at p. 11) and "the fact that John Seifert, Jim Carico, and other Tex-Tenn employees questioned Woythal about retirement to the point *that he believed that he was being pressured to retire* provides evidence of discriminatory animus against Woythal on the basis of his age" (*Id.*) (emphasis added).

Tex-Tenn argues "a company has a legitimate interest in learning its employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct." *Colosi v. Electri-Flex Co.*, 965 F.2d 500, 502 (7th Cir. 1992). Additionally, Tex-Tenn argues Woythal's "[m]ere

personal beliefs, conjecture and speculation are insufficient to support an inference of age discrimination." *Chappell v. GTE Products Corp.*, 803 F.2d 261, 268 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). These are persuasive and reasonable propositions the Court will accept, unless Woythal shows Seifert's and Carico's questions demonstrate age discrimination. When considering statements allegedly showing age-based discrimination, courts review

> whether the comments were made by a decision maker or by an agent within the scope of his employment; whether they were related to the decision-making process; whether they were more than merely vague, ambiguous, or isolated remarks; and whether they were proximate in time to the act of termination.

Cooley, 25 F.3d at 1330.

Woythal must "produce evidence that age was a factor in [Tex-Tenn's] decision to discharge [him] and that but for this factor, [he] would not have been discharged." *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1993), *citing Chappell*, 803 F.2d at 265-66. While the evidence shows the rumors and discussion of Woythal's retirement were not isolated events, the evidence does not demonstrate Woythal's "age" played any significant role at all. Woythal has not once brought to the Court's attention even the slightest reference to his age made by Tex-Tenn.

First, courts reviewing age-related comment cases routinely analyze direct and explicit comments. *See Wells v. New Cherokee*

Corp., 58 F.3d 233, 237 (6th Cir. 1995) ("too old to do the job" and "younger person could do more"); *E.E.O.C. v. Manville Sales Corp.*, 27 F.3d 1089, 1093 (5th Cir. 1994) ("old man," "old and inflexible," and "incapable"); *Corbin v. Southland Intern. Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994) ("At your age you cannot produce like you once could, and we are going to have to make some kind of adjustment."); *Cooley*, 25 F.3d at 1331-32 (wanting a "younger work force," feeling "uncomfortable around older people," fearing "sexual activities would be adversely affected by the aging process," and mentioning "token senior citizens"); *Robinson v. PPG Industries, Inc.*, 23 F.3d 1159, 1164-65 (7th Cir. 1994) ("not keeping employees on until they reached sixty-five").

Second, courts expressly addressing contentions similar to Woythal's have found the employers' questions and references to retirement have amounted to pressure to retire. *See Braverman v. Penobscat Shoe Co.*, 859 F. Supp. 596, 601 (D.Me. 1994) (noting employer "pressured" employee to retire); *Rottersman v. CBS, Inc.*, 726 F. Supp. 484, 488 (S.D.N.Y. 1989) (noting employer "had on repeated occasions asked him why he did not retire"). *Braverman* is instructive. In *Braverman*, the court found the following evidence supported an allegation that the employer repeatedly asked and pressured the employee about retirement: asking about retirement when the employee approached sixty-five, suggesting retirement when the employee underwent radiation treatment, and providing an unsolicited and unwelcome retirement information packet to the employee. *See Braverman*, 859 F. Supp. at 601.

Woythal did not show Tex-Tenn made direct, explicit references to his age. Any comments made in the context of discussing the rumors about Woythal's retirement are too

ambiguous or too abstract to support a claim of age discrimination. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994), *citing Phelps*, 986 F.2d at 1025. Woythal also did not show Tex-Tenn pressured him to retire. The evidence demonstrates Woythal himself generated many, if not all, of the rumors pertaining to his retirement. Both *Braverman* and *Rottersman* indicate it must be the employer who both initiates the questioning about the employee's retirement and then pointedly suggests retirement for there to be pressure. The evidence shows Seifert and Carico responded to rumors and then sought clarification from Woythal. It is a prudent business decision, especially amidst a period of growth and expansion, to make sure the company is fully prepared to address the challenges of its future.

Woythal did nothing but demonstrate to the Court his subjective interpretation of events and circumstances. Accordingly, the Court finds Woythal did not meet his burden under the summary judgment standard. The Court will **GRANT** the motion for summary judgment (Court File No. 9).

An Order will enter.

s/ Curtis L. Collier
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 9, 1997

No. 96-5020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD C. WOYTHAL,

Plaintiff-Appellant,

v.

TEX-TENN CORPORATION,

Defendant-Appellee.

ORDER

BEFORE: KENNEDY, BOGGS, and WOOD,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

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* Hon. Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
F I L E D
OCT 8 1997
CLERK

No. 97-426

In The

Supreme Court of the United States

October Term, 1996

GERALD C. WOYTHAL,

Petitioner,

vs.

TEX-TENN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Tex-Tenn Corporation, has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This case essentially presents a single question for the Court. In the wake of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), what evidence of intentional age discrimination must a plaintiff proffer to create a jury question and, thereby, withstand a motion for summary judgment or directed verdict? Petitioner has misstated or omitted critical facts which were considered by the district court and the court of appeals when each found that Petitioner failed to produce sufficient evidence of age discrimination to withstand Respondent's Motion for Summary Judgment. The material, undisputed facts of this case reveal that under any standard or interpretation of *Hicks*, Petitioner failed to produce any evidence from which a reasonable jury could find that Respondent was guilty of intentional age discrimination.

Tex-Tenn Corporation was founded by Mr. John Seifert (Date of Birth: 08/14/28) in 1981. From 1981 to 1983, Petitioner was one of two engineers who worked for Tex-Tenn and, at that time, held secondary responsibility for necessary engineering functions. From 1983 to 1988, Petitioner served as Plant Manager for Tex-Tenn. In 1988, Tex-Tenn filed for bankruptcy protection for the second time and shut down operations for approximately six months. When Tex-Tenn resumed operations in December of 1988, Mr. Seifert asked Petitioner to come back as Chief Engineer. At that time, Petitioner was approximately sixty-two (62) years old. From December 1988, until his employment ended in December of 1993, Petitioner was Tex-Tenn's Chief Engineer and was responsible for overseeing all engineering functions of the company. (R. 9).

In April of 1993, Tex-Tenn hired Mr. James Carico (Date of Birth: 01/24/45), and in July of the same year, Mr. Carico was named Tex-Tenn's Operations Manager. Following Mr.

Carico's appointment as Operations Manager, Petitioner reported directly to Mr. Carico (he had previously reported directly to the President, Mr. John Seifert). By 1993, Tex-Tenn was experiencing rapid growth and expansion, and Mr. Seifert became concerned about the ability of the company's engineering department to meet the demands created by that growth. He was also concerned about rumors which had been circulating for some time that Petitioner was considering retirement. Mr. Seifert decided to hire an additional engineer and discussed this option with Petitioner, who agreed that additional support in the engineering department would be beneficial in meeting the demands created by Tex-Tenn's expansion. However, Petitioner displayed little interest in participating or assisting in the recruitment of an additional engineer. With no assistance from Petitioner, Mr. Seifert and Mr. Carico recruited Bill Soltes to provide engineering support in addition to that provided by Petitioner. Petitioner's departure precipitated Mr. Soltes placement in the position of Chief Engineer, Petitioner's former position. (R. 9).

The rumors regarding Petitioner's possible retirement and concern over Tex-Tenn's increasing need for engineering support led Mr. Seifert to approach Petitioner on several occasions to inquire what his plans were and what role he wanted to play in Tex-Tenn's future. (R. 9). Contrary to Petitioner's assertions, Mr. Seifert did not pressure Petitioner to retire and did not attempt to procure Petitioner's retirement. The court of appeals reviewed the entire summary judgment record and found that no one at Tex-Tenn even mentioned retirement or suggested that Petitioner retire. In fact, the rumors concerning Petitioner's impending retirement were initiated by Petitioner himself. (Petition for a Writ of Certiorari, App. A at 3a (hereinafter "Petition")). Petitioner's own deposition testimony reveals that Mr. Seifert asked Petitioner only what his plans were:

> **Q.** Why do you believe that Tex-Tenn is guilty of age discrimination with respect to you?
>
> **A.** Well, I was discharged on December 20th by Mr. Carico. And it just seems to me that — Mr. Seifert would ask me questions like: "Gerry, what do you want to do for Tex-Tenn? What are your plans?" And I just told him that I'd like to continue working at Tex-Tenn and continue so until the age 70, and if I didn't tell it directly to him, once — I'm not sure about the age 70, I forget if I ever mentioned that to him, but I do know that I did say I wanted to continue working for Tex-Tenn.
>
> Because he asked me this numerous times, I got the impression that he was trying to tell me that maybe I should retire. And under that circumstance I believe that was age discrimination.

(R. 13).

At most, this testimony reveals that Petitioner speculated that Mr. Seifert wanted him to retire. Petitioner presented no evidence that Mr. Seifert questioned him about retirement or pressured him to retire. It is clear, however, that rumors were rampant throughout Tex-Tenn that Petitioner was considering retirement. During the year 1993, he told many employees that he was planning to retire. The uncontroverted evidence is that Mr. Seifert's motivation was to determine what Petitioner's plans were so that he could ensure continued engineering support during a critical stage of expansion, not to procure Petitioner's retirement. (R. 9).

In his role as Petitioner's supervisor, Mr. Carico determined that Petitioner was not putting forth the effort necessary in his position as Chief Engineer. In October of 1993, Mr. Carico discussed with Petitioner several areas of concern, which he documented and placed in Petitioner's personnel file. Specifically, Mr. Carico spoke with Petitioner concerning his failure to properly maintain equipment and asked that Petitioner develop a preventative maintenance schedule. Mr. Carico also discussed with Petitioner his concern that Petitioner was uninterested in solving problems and displayed a negative attitude. Although he disagreed with Mr. Carico's account of the substance of the October 1993 meeting, Petitioner admitted that Mr. Carico met with him and that the meeting involved Petitioner's performance. (R. 9 and R. 13).

Following the October 1993 meeting, Mr. Carico continued to be frustrated by what he perceived to be an inadequate level of participation and effort on Petitioner's part. On approximately December 20, 1993, Mr. Carico again met with Petitioner to discuss his concerns. Mr. Carico advised Petitioner that Tex-Tenn needed his participation in the company and that if he chose not to participate, he would not be needed at Tex-Tenn. Mr. Carico told Petitioner that he wanted to know by the end of December whether Petitioner intended to be an active participant in the company. (R. 9 and R. 13).

Petitioner acknowledges that the December 20, 1993 meeting with Mr. Carico took place and admits that this meeting also involved a discussion of Petitioner's performance of his duties for Tex-Tenn. However, Petitioner contends that in this meeting, Mr. Carico terminated his employment and told him to vacate his office by December 30, 1993. At some point between the December 20, 1993 meeting and December 30, 1993 (Petitioner's last day of employment), Mr. Seifert learned that Petitioner believed he had been discharged. Mr. Seifert met with

Petitioner on December 30 and told him that he could keep his keys and could come back to work at Tex-Tenn if he changed his mind. Despite Petitioner's apparent desire to terminate his employment with Tex-Tenn, Mr. Seifert continued to represent to Petitioner, up until the last day he worked, that he was willing to work something out with Petitioner and expressly told him "the door is always open." (R. 9 and R. 13).

The district court found the existence of a material factual dispute surrounding the circumstances of Petitioner's departure from Tex-Tenn. However, both parties agree that a meeting between Mr. Carico and Petitioner took place wherein Mr. Carico expressed concerns over Petitioner's performance and that as a result of that meeting, Petitioner's employment with Tex-Tenn ended. Tex-Tenn is willing to concede for purposes of summary judgment that Petitioner believed he was fired during the course of that meeting. Assuming that a jury could find that Petitioner's belief that he was fired was reasonable, the district court and the court of appeals found that Tex-Tenn had carried its burden of articulating justifiable non-discriminatory reasons for the termination of Petitioner. Tex-Tenn was faced with an increasing need for engineering support and a Chief Engineer who appeared increasingly disinterested in the company's future and displayed a negative attitude. (Petition, App. A at 6a and App. B at 20a-24a). Petitioner admits that there was dissatisfaction with his work and that Mr. Carico met with him in October 1993 and again in December 1993 over perceived performance deficiencies. Although Petitioner may have disagreed with Mr. Carico's assessment of his performance and abilities, he offered no evidence that Mr. Carico's opinions were not legitimately held.

Petitioner also argues that the timing of the hiring of Mr. Soltes provides support for his claim of age discrimination. Petitioner provides no support or evidence as to how Mr. Soltes'

hiring evidences age discrimination against Petitioner. Petitioner clearly knew that Mr. Seifert had been looking for additional engineering support for months. (R. 9). After reviewing the record, the court of appeals found that Tex-Tenn had decided to hire another engineer long before Petitioner left and that Mr. Soltes was initially hired to assist Petitioner, not replace him. (Petition, App. A at 8a). Petitioner's assertion that the search for Mr. Soltes was conducted without his consultation or input ignores critical facts. As with other pressing matters within Tex-Tenn and the engineering department, Petitioner displayed no initiative or interest in assisting Mr. Seifert in finding additional engineering help. Mr. Seifert and Mr. Carico were forced to look for an engineer with no assistance from Petitioner. (R. 9).

REASONS FOR DENYING THE WRIT

Every court of appeals has directly addressed the standard for evaluating motions for summary judgment or directed verdict in light of this court's opinion in *Hicks*. The majority of the circuits have developed a standard which is consistent with *Hicks* and traditional principles of summary judgment. However, four circuits have misinterpreted *Hicks* in analyzing the plaintiff's burden in the face of a motion for summary judgment or directed verdict. In reviewing the district court's grant of Respondent's summary judgment motion, the Sixth Circuit conducted the proper analysis which has been developed by a majority of the circuits and which is appropriate and consistent with the guidance of the Court in *Hicks*. Respondent opposes certiorari in this action because the Sixth Circuit's affirmation of summary judgment in this case is consistent with the law of the Court and a majority of the circuits. Further, contrary to Petitioner's assertion, Respondent would have prevailed on its motion under any standard that could be applied.

Respondent urges the Court to deny the petition for certiorari

and spare Respondent the burden of further time and expense in this matter. Should the Court determine that it is appropriate and necessary to clarify its opinion in *Hicks* and elaborate on the plaintiff's burden in the face of a motion for summary judgment or directed verdict, justice would be better served by granting certiorari in a case where the petitioner has been harmed by the application of a standard which is inconsistent with the Court's precedents.

In his petition, Petitioner presents three questions to the Court for review. Essentially, two of those questions may be phrased as a single issue: Where a plaintiff does not have direct evidence of unlawful discrimination and is proceeding under the burden shifting scheme developed in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), what evidence must the plaintiff produce to avoid a summary judgment or a directed verdict? In his third question presented for review, Respondent asks the Court to address the issue of whether the evidence introduced in a plaintiff's prima facie case may be reconsidered when a plaintiff reaches the point where he must introduce evidence of pretext and unlawful discrimination. Respondent does not believe that any circuit has held that a plaintiff may not rely on the evidence presented in his prima facie case in opposing a motion for summary judgment or a directed verdict. Because the facts of this case and the opinions of the courts below do not raise this issue, Respondent will not address it here.

The burden-shifting scheme developed in *McDonnell Douglas Corp. v. Green* requires that the plaintiff initially proffer enough evidence to establish a prima facie case of discrimination. Having done so, the defendant must articulate a legitimate, non-discriminatory reason for the alleged adverse employment action. At this point, the plaintiff must set forth facts from which a reasonable jury could find that the defendant's

articulated reason(s) are not the true (or only) reason(s) and that the defendant was actually motivated by unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In 1993, the Court decided *St. Mary's Honor Center v. Hicks* and resolved a division among the federal courts in holding that a fact-finder's determination of pretext, without a finding of discrimination, was insufficient to support a judgment in favor of the plaintiff. In the wake of *Hicks*, the federal courts have developed standards for determining what evidence must be produced by a plaintiff to survive a motion for summary judgment or directed verdict. It is inaccurate, however, to divide the federal courts into "pretext-only", "pretext-plus", and "other" when describing the courts' positions in evaluating discrimination claims at the summary judgment or directed verdict stage. These labels, while convenient, are not adequately descriptive of the actual analysis that has been performed in the various circuits.

With the exception of the Third, Tenth, Eleventh and D.C. Circuits, the federal courts have approached the review of a grant or denial of such motions by applying what may be called the "totality of the evidence standard." The courts, in reviewing a motion for summary judgment or directed verdict, look to the entire record to determine whether the plaintiff has introduced enough evidence to allow a reasonable jury to render a verdict in the plaintiff's favor. A careful reading of the opinions of the majority of the circuits reveals that they have focused on all the evidence proffered by the plaintiff, whether introduced to establish the prima facie case, to demonstrate pretext, or to provide additional evidence of a discriminatory animus.

No circuit has held that a plaintiff ***must*** introduce evidence

of discriminatory animus in ***addition*** to evidence of pretext. Respondent erroneously cites the First and Fifth Circuits as "pretext-plus" jurisdiction. The First Circuit, in *Udo v. Tomes*, 54 F.3d 9 (1st Cir. 1995) (cited by Petitioner),[1] did not hold that a plaintiff must necessarily have additional evidence of discrimination after producing evidence of pretext. Rather, in *Udo*, the court said that the plaintiff must produce evidence from which a jury could find: ". . . (1) that the employer's articulated reason for laying off the plaintiff is a pretext, and (2) that the true reason is discriminatory." *Udo*, 54 F.3d at 13 (1st Cir. 1995) (citing *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)). The plaintiff's burden of production was further explained: "While the plaintiff ***may rely on the same evidence to prove both pretext and discrimination***, the evidence must be sufficient for a reasonable fact finder to infer that the employer's decision was motivated by discriminatory animus." *Id.* (Emphasis added).

Likewise, the Fifth Circuit has not imposed a ***requirement*** that a plaintiff produce additional evidence of discrimination after introducing evidence of pretext. Sitting *en banc*, the court in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), provided an excellent explanation of the plaintiff's burden in surviving a summary judgment motion:

> To sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational fact finder to make a reasonable inference that age was a determinative reason for the employment

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1. In addition to "pretext-only" and "pretext-plus", Petitioner maintains there exists a third category of circuits which, according to Petitioner, apparently have not developed a well-defined standard in light of *Hicks*.

> decision. The fact finder may rely on all the evidence in the record to draw this inference of discrimination. ***In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence.*** Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence ***taken as a whole*** would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994 (emphasis added). The *Rhodes* opinion leaves no doubt that the Fifth Circuit has adopted the "totality of the evidence" rule in considering motions for summary judgment in discrimination cases. The court in *Rhodes* further explained the appropriate analysis in considering such motions:

> The evidence necessary to support an inference of discrimination will vary from case to case. A jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false. The evidence may, for example, strongly indicate that the

> employer has introduced fabricated justifications for an employees's discharge, and not otherwise suggest a credible nondiscriminatory explanation.
>
> By contrast, if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's proffered reasons is not substantial, a jury cannot reasonably infer discriminatory intent. . . .

Id.

The "totality of the evidence" standard used in *Udo v. Tomes* and *Rhodes v. Guiberson Oil Tools* has also been adopted by every other circuit with the exception of the Third, Tenth, Eleventh and D.C. Circuits. *See, e.g., Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. 1997):

> When a court comes to consider, either upon defendant's motion for summary judgment, or after a plaintiff's verdict, whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness or falsity of the employer's explanation, or any other piece of evidence. As in any other type of case, the judge must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination. If so, summary judgment must be denied and/or a jury verdict for plaintiff must be sustained. If not, the

> defendant is entitled to summary judgment or to the overturning of a plaintiff's verdict as clearly erroneous.

Id. at 1347. *See also Henson v. Liggett Group, Inc.*, 61 F.3d 270, 275 (4th Cir. 1995) ("... the 'straightforward' question to be answered ... is whether the plaintiff has successfully demonstrated that she was the victim of age discrimination ... [The plaintiff] ... must demonstrate by a preponderance of the evidence that [the employer's] reasons were a pretext for discrimination."); *Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir. 1995) (To defeat summary judgment a plaintiff must produce enough evidence to allow a reasonable fact-finder to infer that the employer's articulated reasons were false and that the employee was actually discharged because of his age.) (*but see Perdomo v. Browner*, 67 F.3d 140 (1995)); *Krenik v. County of LeSueur*, 47 F.3d 953, 958-60 (8th Cir. 1995) (Plaintiff's evidence must allow inference of intentional discrimination which could be accomplished through prima facie case and evidence of pretext.); *Bradley v. Harcourt Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (The plaintiff "... bears the ultimate burden of persuading the court that the stated reason for the discharge was false and the true reason for the discharge was unlawful sex discrimination. [citations omitted] To avoid summary judgment, [the plaintiff] 'must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses.' *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) She must produce 'specific, substantial evidence of pretext.' *Id.*").

Thus, a careful reading of the majority of the circuits' opinions on the plaintiff's burden at the summary judgment or directed verdict stage reveals that, consistent with the opinion of the Sixth Circuit in the present case, each has developed an analysis consistent with *Hicks* and with the law governing the

grant or denial of summary judgment. A minority of circuits have taken an approach that is not consistent with *Hicks* and is violative of summary judgment jurisprudence. The Third, Tenth, Eleventh and D.C. Circuits have all held that a plaintiff may survive summary judgment on a showing of pretext without necessarily introducing any evidence of discrimination. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3rd Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997) (Plaintiff must meet threshold requirement of prima facie case and showing of pretext, but it is the province of the jury to draw inferences from the testimony, including the inference of discrimination.); *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997); *AKA v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997).

The question of the proper analysis in the context of a motion for summary judgment or directed verdict post-*Hicks* must necessarily arise within the broader context of summary judgment jurisprudence. The Court's decisions in the landmark cases of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) provide the framework within which the principles enunciated in *Hicks* must be examined. In *Anderson v. Liberty Lobby* the Court said:

> . . . the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could

> properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Id. at 249, 251. And in *Celotex*, the Court made it plain that a plaintiff must produce sufficient evidence to prove every element of his or her claim:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. . . . The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. at 322-23. *See also Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' ").

Applying the standards developed by the Court in ruling on any summary judgment motion to the holding in *Hicks*, that a fact-finder is ***permitted*** but not ***required*** to find discrimination from a showing of pretext, the only consistent and rational conclusion is the "totality of the evidence" standard applied by the Sixth Circuit in the present case and adopted by the majority of the circuits.

CONCLUSION

It may be necessary for the Court to resolve the inconsistent standards which are applied in the federal courts in reviewing motions for summary judgment or directed verdict. If the Court determines that it should resolve the conflict that exists, it will most certainly have occasion to review a decision from one of the circuits that has applied the faulty "pretext-only" standard. A grant of certiorari in such a case would present the Court with an opportunity both to provide guidance to the circuits on the appropriate legal standard and to right an injustice caused by the application of the incorrect standard. The present case was decided under the appropriate legal principles developed by the Court in *McDonnell Douglas* and *Hicks*. Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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